

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

IN RE: SANTA FE NATURAL TOBACCO
COMPANY MARKETING & SALES
PRACTICES AND PRODUCTS LIABILITY
LITIGATION

LEAD CASE NO. MD 16-2695 JB/LF

This Document Relates to All Cases

Lytle, et al. v. Nutramax Laboratories, Inc., et al., Case No. ED CV 19-0835 FMO

(“*Nutramax*”) (Olguin, F.) (Ex. 1), is another example of a court granting class certification of a class of consumer product purchasers where Dr. Jean Pierre Dubé proffered the precise damages methodology offered in support of class certification here. Furthermore, the *Nutramax* court denied the defendants’ *Daubert* challenge as to Dr. Dubé.

In *Nutramax*, the plaintiffs challenged the advertising on the packaging as misleading to the reasonable consumer and alleged that the plaintiffs either would not have bought the products or were charged a price premium as a result of the defendants’ packaging misrepresentations. *Id.* at 2.

The court considered the defendants’ arguments that 1) Dr. Dubé did not utilize critical data in his damages analysis, 2) he did not execute the conjoint analysis, and 3) the class members were not all exposed to the challenged statements. *Id.* at 10. The court concluded that conjoint analysis is a well-established method for measuring class-wide damages in consumer protection actions and satisfies *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). *Id.* at 31. Further, the court confirmed Dr. Dubé need not actually execute on the conjoint analysis at class certification so long as his model is capable of measuring damages on a class-wide basis, which is all that *Comcast* requires. *Id.* Rejecting the defendants’ argument that the class includes

individuals who did not see the challenged claims, the court concluded that where at least one of the challenged claims can be found on the front packaging of the products (with other claims prominently elsewhere), a conjoint analysis is a sufficient tool to measure the impact of challenged label claims. *Id.* The court was likewise unpersuaded that the alleged inclusion of uninjured class members (individuals who had expressed satisfaction with the products) defeats the plaintiffs' ability to measure damages on a class-wide basis. *Id.* at 32.

Here, Dr. Dubé concluded that the determination of class-wide economic damages can be calculated using a conjoint analysis. ECF No. 280-008. Using the preference estimates from the Conjoint Analysis, Dr. Dube opines he can implement a marketplace simulation to measure the price premium. *Id.* ¶19. Further, the preference estimates from the Conjoint Analysis can likewise be used to measure willingness-to-pay, the microeconomic measure of total incremental class-wide economic value from the benefits associated with the Challenged Claims on the labels of the Challenged Products. *Id.* ¶20. The *Nutramax*, like many courts nationwide, found this exact damages methodologies feasible and capable of calculating class-wide damages.

Nutramax, Ex. 1 at 33.

In granting class certification, Judge Olguin's reasoned opinion considered the latest attacks on the utilization of conjoint analysis for calculating class-wide damages and concluded Dr. Dubé's methodology is sound.

June 1, 2022

Respectfully submitted,

By /s/ Melissa S. Weiner
 Melissa S. Weiner
 PEARSON, SIMON & WARSHAW, LLP
 800 LaSalle Ave., Suite 2150
 Minneapolis, MN 55402
 Phone: (612) 389-0601
 Email: mweiner@pswlaw.com

Scott P. Schlesinger
Jeffrey L. Haberman
Jonathan R. Gdanski
SCHLESINGER LAW OFFICES, P.A.
1212 SE Third Ave.
Ft. Lauderdale, FL 33316
Phone: (954) 467-8800
Email: scott@schlesingerlaw.com
Email: jhaberman@schlesingerlaw.com
Email: jgdanski@schlesingerlaw.com

D. Greg Blankinship
FINKELSTEIN, BLANKINSHIP, FREI-
PEARSON & GARBER, LLP
One North Broadway, Suite 900
White Plains, NY 10601
(914) 298-3290
Email: gblankinship@fbfglaw.com

Caleb Marker
ZIMMERMAN REED LLP
2381 Rosecrans Avenue, Suite 328
Manhattan Beach, CA 90245
(877) 500-8780 Telephone
(877) 500-8781 Facsimile
Email: caleb.marker@zimmreed.com

Michael R. Reese
REESE LLP
100 West 93rd Street, 16th Floor
New York, New York 10025
Telephone: (212) 643-0500
Facsimile: (212) 253-4272
Email: mreese@reesellp.com

James W. Gustafson, Jr.
SEARCY DENNEY SCAROLA BARNHART &
SHIPLEY, P.A.
The Towle House, 517 North Calhoun Street
Tallahassee, FL 32301
Telephone: (850) 224-7600
Email: gustafsonteam@searcylaw.com

Matthew D. Shultz
LEVIN, PAPANTONIO, ET AL.
316 S. Baylen St., Suite 600
Pensacola, FL 32502
Phone: (850) 435-7140
Email: mschultz@levinlaw.com

Ronald A. Marron
LAW OFFICES OF RONALD A. MARRON
651 Arroyo Drive
San Diego, California 92103
Telephone: (619) 696-9006
Facsimile: (619) 564-6665
Email: ron@consumersadvocates.com

*Counsel for Plaintiffs and Proposed Class
Counsel*